



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

#334

11/20

DATE ISSUED: November 13, 2007 REPORT NO: 07-192

ATTENTION: Council President and City Council
Docket of November 20, 2007

SUBJECT: Automated Refuse Container Replacement Fee

REFERENCE:

REQUESTED ACTION:

1. Adopt a resolution modifying the existing automated refuse container policy to return responsibility to the individual eligible City resident or small business customer to furnish approved replacement automated refuse containers at their own expense.
2. Adopt a resolution, pursuant to noticed public hearing, revising the Automated Refuse Container Fee schedule to provide for an increase to recover specific current costs of container acquisition, replacement, handling, and container delivery when requested.
3. Authorize the Mayor to establish a cost recovery fee for replacement automated refuse containers to be charged to customers who choose to acquire their replacement containers from the City, and direct the City Clerk to amend the Ratebook of City Fees and Charges to include the automated container program fees described above.
4. Authorize the City Auditor and Comptroller to deposit the Automated Refuse Container Replacement fees, including any corresponding delivery fees, into Fund 10509, the Automated Refuse Container Fund, to be used for the purpose of administering the Automated Refuse Container Replacement Program.
5. Authorizing Auditor and Comptroller to transfer funds, annually or as often as is deemed necessary, from the Automated Refuse Container Fund 10509 to offset costs incurred in the General Fund to purchase, deliver, repair and/or replace automated refuse containers, and administer the Automated Refuse Container Replacement Program.
6. Receive the Automated Refuse Container Replacement Fee Report and attached Cost Analysis and Fee Calculation, Exhibit B; and,

7. Receive the revised Environmental Services Department Regulation, "Automated Container Policy", Exhibit A, which will be promulgated pursuant to the authority established in Sections 66.1024, 66.0126, and 66.0127 of the San Diego Municipal Code.

STAFF RECOMMENDATION:

Modify the existing automated refuse container policy to return responsibility to the individual eligible City resident or small business customer (hereafter referred to as customer) to furnish approved replacement automated refuse containers at their own expense. Authorize the Mayor to establish a fee for replacement automated refuse containers and revise the Automated Refuse Container Fee Schedule to reflect current costs for containers including additional containers. Receive the Automated Refuse Container Replacement Fee Report, the Cost Analysis and Fee Calculation, and the Revised Department Regulation, "Automated Container Policy".

SUMMARY:

This action would revise the Automated Container Policy and Fee Schedule. The policy would be revised to return responsibility to eligible customers of City-provided refuse collection services to furnish replacement automated refuse containers at their own expense. Customers would have the option of purchasing a replacement automated refuse container from the City or acquiring an approved container from a retailer or other legal source. The City would continue to provide one initial automated refuse container to a newly constructed housing unit on a one-time basis at the City's expense. This action also would revise the Automated Container Fee Schedule to reflect the current costs of container acquisition and associated container services, establish a fee for a replacement automated refuse container, and adjust the optional delivery fee to reflect current costs.

This fee adjustment will provide mitigation for anticipated fiscal impacts to the General Fund associated with the proposed Construction and Demolition (C&D) Ordinance and the City-wide Recycling Ordinance (CRO).

Under this fee proposal, customers currently using their first City-provided automated container for refuse collection would continue to use that container as long as it remains serviceable and residents of new housing units would receive one (1) initial automated refuse container on a one-time basis without a fee when collection services are initiated. However, customers would be responsible for furnishing, at their expense, all automated refuse containers after the initial container. Thus, when the initial container is no longer serviceable and out of warranty; lost or stolen, the customer will be responsible for replacing it with another approved automated refuse container. The fee charged for replacement of City-provided refuse containers under warranty would be prorated based on the years the container had been in use as a percentage of its ten year expected useful life.

Residents may obtain approved containers from commercial sources, other legal private sources or through the Environmental Services Department (ESD). The City will not be responsible for warranty claims related to containers obtained from other than the ESD. Consistent with existing policy and the People's Ordinance, use of other than City-approved automated containers would constitute grounds for temporarily suspending City-provided refuse collection services until an approved container is furnished and/or denial of any damage claims associated with that container.

BACKGROUND:

The People's Ordinance of 1919, codified at Section 66.0127 of the San Diego Municipal Code, provides that: "*Residential Refuse shall be collected, transported and disposed of by the City at least once each week and there shall be no City fee imposed or charged for this service by City forces.*" Certain small businesses also receive City refuse collection services, pursuant to the People's Ordinance. In order to be eligible for City collection services, residential and small business refuse must be placed at the curb line of a public street on the designated collection day in a *City approved container*. Refuse collection services have historically been funded entirely from the General Fund. When the refuse collection process was automated beginning in 1994, one (1) automated container was supplied to each customer at City expense. An automated refuse container user fee was established at this time to recover the cost of additional containers desired by customers.

From 1919 through 1994 (prior to automated collection) residents and small businesses receiving City collection services were responsible to provide, repair, and replace, at their own expense, their City-approved refuse containers. SDMC section 66.0127, commonly known as the People's Ordinance, does not require the City to furnish approved containers for City refuse collection services. SDMC section 66.0126 expressly requires the person responsible for a residential unit or business location to provide adequate containers to contain the amount of refuse generated during the intervals between scheduled collection days, also clearly indicating that the provision of refuse storage and collection containers is not considered a City obligation under the People's Ordinance. This opinion is more fully discussed in City Attorney Report to Mayor and Council, "Potential Trash Fee, Recycling Fee, Trash Container Fee, and Equipment Fee", dated June 13, 2005.

In 1994, the City began providing uniform automated refuse containers to residents and small businesses, without charge, as part of the implementation of City-wide automated refuse collection. Converting from manual to automated collection has provided substantial cost savings. The purpose of initially providing automated containers to City customers without a fee was to ensure that the containers would be fully compatible with the City's new automated and semi-automated collection vehicles. The cost of providing the initial automated container to residential and small business refuse collection customers was funded through the ESD General Fund operating budget. The City-provided automated containers are assets of the City of San Diego, and ownership is not transferred to the resident or property owner.

DISCUSSION:

ESD currently provides automated refuse collection services to approximately 296,000 residential and 7,600 small business customers. The City currently furnishes one (1) automated refuse container at City expense to each resident or small business customer. Additional automated refuse containers are provided to residents (no limit) and small businesses (limit of 2 containers total) upon request with the payment of a one-time \$50 non-refundable user fee per additional container. Currently, approximately 319,000 automated refuse containers are in use, including those at City facilities such as libraries and fire stations.

Automated refuse collection containers are constructed of heavy duty, durable polyethylene material. They are specifically designed for use with the automated collection equipment, which involves a single driver manipulating a hydraulically powered arm to pick up and empty the container. The normal life expectancy of automated containers is 10 or more years, and City obtained containers include a limited 10-year manufacturer's warranty. By contrast, most standard manual collection containers are light to medium duty plastic containers with a much shorter normal life span that would be easily damaged by the hydraulic grippers used by the automated collection vehicles.

A significant portion of the automated refuse container inventory is approaching the end of its expected useful life. These containers will likely need to be replaced over the next few years. Some containers have already been in use beyond the 10-year manufacturer's warranty period. To date, container replacement costs have been borne by the General Fund when the container is no longer covered by warranty. In addition, two to three percent of the automated container inventory requires replacement annually due to theft or damage not covered by the manufacturer's warranty.

Since FY 1994, additional and replacement automated refuse containers have been purchased as a regularly budgeted expense item. However, it has also been necessary to purchase additional containers as an unfunded, over-budget, expense, to meet the needs of new customers and to replace lost, stolen, or damaged containers not covered by warranty. Container funding was eliminated from the FY 2006 budget, but \$500,000 was restored to the General Fund budget for refuse container purchases in FY 2007. If the Automated Container Policy is revised to require customers to furnish replacement containers at their own expense and customers who choose to purchase their container from the City are charged a cost recovery fee for the replacement container, it would shift a portion of the container expenses from the General Fund to the individual customers. Funds which would otherwise have been budgeted for containers could be used to mitigate the fiscal impacts of the C&D and CRO Ordinances. Funding for the purchase of containers for new residential units and a portion of the cost for containers still under warranty, damaged by City equipment not covered by the warranty, would be required within the General Fund.

ESD proposes a revision to the Automated Container Policy to require customers to furnish approved replacement automated refuse containers at their own expense, which could be acquired from a commercial source, the manufacturer or from the City. ESD also proposes the establishment of an Automated Refuse Container Replacement Fee to cover the costs of

providing replacement automated refuse containers and associated services. The proposed fee, outlined in more detail in the attached Revised Department Regulation, "Automated Container Policy", and the Cost Analysis and Fee Calculation, is \$70 for each refuse container and \$25 for delivery when desired. Alternatively, customers could acquire approved replacement automated refuse containers through commercial retail outlets such as home improvement stores, from manufacturers or other legal private sources. ESD also proposes revising the fees for additional automated refuse containers to reflect current costs as shown in the attached Cost Analysis and Fee Calculation.

FISCAL CONSIDERATIONS:

The proposed C&D Ordinance is anticipated to result in both increased costs and reduced revenues for the General Fund from the diversion of C&D material from Miramar Landfill. The former is due to the higher cost of recycling C&D material generated by General Fund departments. The latter is due to the loss of RCBT revenue generated from C&D material currently being disposed of at Miramar Landfill.

The fiscal impact to the General Fund of the C&D Ordinance is estimated to be \$300,000 per year, beginning in FY 2009. The Automated Refuse Container Replacement Fee is anticipated to generate approximately \$500,000 in FY 2008 with an effective date of January 1, 2008, and approximately \$1M per fiscal year, and increasing thereafter, depending on the failure rate of containers and the number of customers who choose to acquire a replacement container from the City.

Implementation of this user fee will offset a portion of the anticipated General Fund cost for replacement containers. In the worse case, if the containers all needed to be replaced in the next year, and there was no fee for replacements, 319,000 automated refuse containers would need to be replaced at a cost of \$48.46 apiece plus the Administrative cost associated with these replacements at a cost of \$21.72 each plus the cost of delivery at \$26.79 per container. This would total nearly \$30M for automated container replacement program costs over the next ten years if replaced all at once. Using a conservative approach of replacing only upon failure will result in longer life and reduced cost depending on the actual failure rate of containers.

LEGAL DISCUSSION:

Imposing a fee for replacement automated refuse containers raises two legal issues: (1) is the fee precluded by the People's Ordinance; and (2) would the fee be subject to the requirements of Proposition 218. The People's Ordinance, codified at San Diego Municipal Code section 66.0127, does not require the City to provide the approved containers necessary to be eligible for City refuse collection services. Moreover, the People's Ordinance does not preclude the City from charging customers for the use of approved containers supplied by the City. See previously issued City Attorney Report to Mayor and Council, "Potential Trash Fee, Recycling Fee, Trash Container Fee, and Equipment Fee" dated June 13, 2005, for detailed discussion. As presently structured, the proposed automated refuse container replacement fee probably would not be subject to Proposition 218. (See Exhibit C, City Attorney Memorandum of Law dated October 16, 2007).

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

As required for a revision of City fees, public notice will have been placed in *The Daily Transcript* 10 days prior to the City Council meeting at which this item is heard. The community will have this opportunity to make public comment about the changes in fees.

Additionally, ESD will provide information on the fee changes on our web site, in presentations to community groups, in a fact sheet provided to the public, in a press release and in response to inquiries to our customer service call center. A limited number of customers will be affected at the onset of the fee changes so a large public response is not anticipated.

CONCLUSION:

Automated refuse collection containers represent a continuing and increasing cost to the City's General Fund. The use of an automated collection process facilitates safer and more cost-effective collection and contributes to improved neighborhood aesthetics compared to the prior manual collection process. The existing automated refuse collection container inventory is approaching the end of its useful life, and many containers in service are already beyond the warranty period. In addition, population growth continues to place an increasing demand on General Fund resources to fund the acquisition of the initial automated refuse containers needed for new service locations.


Requiring residents to acquire replacement automated refuse containers at their own expense is consistent with the People's Ordinance and other applicable Municipal Code provisions governing refuse collection. Implementation of this user fee is expected to offset anticipated General Fund program expenditures by approximately \$10M over the next ten years.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:


The Key Stakeholders in this proposed action are the residents of the City of San Diego. The revised container policy, new replacement automated refuse container fee, and other container-related fee increases will affect all residents by providing revenue reimbursement to the General Fund equal to the cost of providing replacement automated refuse containers over time and delivering containers. The return to the policy of resident responsibility for obtaining an approved refuse container at their own expense to take advantage of the City's residential refuse collection service at no additional fee will gradually impact these residents over time. However, the cost of the fee for use of an approved container at \$70 amounts to just \$7 per year, less than \$.60 per month.

ALTERNATIVE

1) Continue to allocate General Fund monies to pay for the purchase, maintenance, repair, and replacement of automated refuse containers at an anticipated cost of \$29.5M over the next ten years.



Elmer L. Heap, Jr.
Environmental Services Director



R.F. Haas
Chief of Public Works

ELH/CEW

Exhibit A: City of San Diego ESD Department Regulation; Automated Container Policy
Exhibit B: Automated Refuse Container User Fee Calculation Spreadsheet
Exhibit C: City Attorney Memorandum of Law dated October 16, 2007

CITY OF SAN DIEGO ENVIRONMENTAL SERVICES DEPARTMENT REGULATION

SUBJECT	DR NUMBER	EFFECTIVE DATE
AUTOMATED CONTAINER POLICY	ESD-001 Revised	May 10, 2006 Supersedes D-0001-00 January 07, 2000

Authority:

San Diego Municipal Code (SDMC) Sections 66.0127(a), (c) require eligible customers to place refuse in "approved" containers in order to receive City provided refuse and recycling collection services. SDMC Section 66.0124 authorizes the City Manager to promulgate rules and regulations regarding the collection of refuse within the City of San Diego. This authority includes establishing collection service standards, and setting standards and specifications for "approved" containers. Finally, SDMC Section 66.0126 does not require that the City of San Diego provide residents these "approved" containers at City expense.

Definitions:

Approved Container means the container(s) which meet the specifications approved by the City Manager for use by City residents and eligible small businesses, receiving City collection services, for the temporary storage pending the regularly scheduled collection of refuse, recyclable material, or green material as defined by the SDMC.

Automated Container means the approved container designated by the City Manager for use by eligible City residents and small businesses, receiving City automated refuse collection services, for the temporary storage pending the regularly scheduled collection of refuse, recyclable material, or green material as defined by the SDMC.

City means City of San Diego, a municipal corporation, and all the territory lying within the municipal boundaries of City as presently existing or as such boundaries may be modified during the term of this regulation.

City Manager or "Manager" means the City Manager of the City of San Diego, or a duly authorized representative.

Collect/Collection means to take physical possession and transport solid waste within the City.

Director means the Director of the City of San Diego Environmental Services Department (or its successor) or a duly authorized representative of the Director.

Container Fee means the charge for obtaining an approved automated refuse or recycling container.

Container Handling Fee means the charge for the labor and overhead costs associated with maintaining the container inventory and responding to customer service complaints and servicing "approved" containers.

Delivery Fee means the charge for labor and overhead costs associated with delivery by the City of an "approved" automated container.

Green Material or Greenery means any plant material that is either source separated at the point of generation (curb), or separated at a centralized facility that employs methods to minimize contamination. Green material includes, but is not limited to, yard trimmings, plant wastes from the food processing industry, manure, untreated wood wastes, paper products, and natural fiber products. Green material does not include treated wood waste, mixed demolition or mixed construction debris.

Recyclable Material means residential, commercial or industrial source separated byproducts of some potential economic value, set aside, handled, packaged, or offered for collection in any manner different from refuse.

Refuse means waste material of any nature or description generated within the City limits, excluding hazardous or toxic chemicals, wastes, materials or substances as defined now or hereafter by federal or state law or regulation;

Small Business Enterprise means a commercial establishment providing sales and/or services to the public and licensed or taxed by the City.

Policy:

The City of San Diego requires that eligible residents and small businesses who desire City Refuse Collection services use "approved" automated containers which may be acquired from commercial sources, manufacturers, the City's Environmental Services Department or through other legal sources. It is the policy of the City to establish fees to recover the costs of providing goods and services in accordance with Administrative Regulation No. 95.25. "Approved" automated refuse containers obtained from the City will be provided for a fee which recovers the costs associated with providing the container.

Regulations:

The following fee schedule and related automated container regulations are established for the use of approved automated containers by residents and small business enterprises receiving City refuse collection services.

I. General:

A. Intent and Purpose

The intent and purpose in promulgating this regulation is to provide for the effective and efficient implementation and administration of a user fee schedule and related regulations for approved automated containers used by City residents and small business enterprises receiving City collection services. Nothing in this regulation shall be construed to prevent any resident from legally acquiring an "approved" container from any commercial source offering containers for sale which meet the City approved specifications for "approved" containers. The City will not be responsible for any damage or failure resulting from the use of other than "approved" containers nor for damage resulting from the misuse of "approved" containers.

B. Authority of Environmental Services Director

The administration and implementation of this Waste Management Regulation is under the direction of the Director of the Environmental Services Department (or successor), who has the authority to require the payment of the relevant fees prior to delivery or repair of containers. The Director also has the authority to review rates and recommend adjustments to the City Manager as needed in accordance with Council Policy 100-5 and Administrative Regulation 95.25 to ensure that all reasonable costs of goods and services incurred in connection with the provision of these automated containers are being recovered.

C. Fee Schedule

1. Initial Container, new refuse or recycling services (new construct)	\$00.00 ea.
2. 1 st Additional Refuse (Black) Containers (same address).....	\$70.00 ea.
3. All Replacement of Refuse Containers including initial.....	\$70.00 ea.
4. Additional Recycling Containers.....	\$00.00 ea.
5. 1 st Additional Greenery Container	\$00.00 ea.
6. 2 nd Additional Greenery Containers.....	\$25.00 ea.
7. 3 rd and subsequent Additional Greenery Containers	\$50.00 ea.
8. Container Delivery (all).....	\$25.00 ea.
9. Non-Warranty Container Repair, plus parts...(Green/Blue Only)	\$25.00 ea.

Notes:

- Fees are per container and include an administrative handling fee component.
- Replacement Fee may be pro rated based on container age.
- Delivery fee must be received prior to scheduling delivery.
- Delivery fee can be avoided when container is picked up at ESD facility.
- Eligible small businesses are limited to two refuse containers.

- f) Requests for a third recycling container will prompt an evaluation by staff to determine the actual need and potential for misuse (eg. Container used for trash).
- g) Residents are strongly encouraged to utilize the largest size initial container to ensure most efficient collection.
- h) Residents are responsible and accountable for all automated containers provided for their use.
- i) City will provide one (1) container exchange to the original recipient at no fee following the initial delivery or receipt of an automated container. Subsequent exchanges will be subject to the \$25 delivery fee. Containers may be exchanged at the ESD Operations Station, 8353 Miramar Place at no charge, provided the container is clean and serviceable.

D. Effective Date

This Waste Management Regulation shall be in full force and effect as of January 1, 2008.

E. Prior Regulations Superseded

This Department Regulation supersedes Department Regulation 0001-00 effective 01-07-00.

Authorized: _____
City Manager

Authority:

- San Diego Municipal Code sections, 66.0124, 66.0126, 66.0127
- City Attorney's Report to Mayor and Council dated June 13, 2005 re: Potential Trash Fee, Recycling Fee, Trash Container Fee, and Equipment Fee
- Local Police Power
- City Council Resolution No. _____ adopted _____.
- City Council Resolution No. R-283379 adopted February 7, 1994
- City Council Resolution No. R-279904 adopted _____.

Container Fee
Cost Analysis and Fee Calculation
Supporting Document for Proposed Automated Refuse Container Fee Changes

1. CONTAINER COST (FY 07)

96 gallon container		\$	44.05
Sales tax			3.41
Freight			<u>1.00</u>
Sub total		\$	<u>48.46</u>
Container Handling and Support			
Computer Support	1,040 hrs @ \$34.50	\$	35,880.00
Customer Service	2,080 hrs @ \$18.23		37,918.40
Acctg (DCR's, Inv.)	2,080 hrs @ \$18.23		37,918.40
Container prep.	520 hrs @ \$19.07		9,916.40
Supervision (direct)	1,040 hrs @ \$24.99		25,989.60
Labor Load rate	@ 18%		<u>26,572.10</u>
Sub total		\$	<u>174,194.90</u>
Fringe rate	@ 64.7%	\$	112,617.01
Fringe load	@ 18.0%		<u>20,271.06</u>
Sub total		\$	<u>132,888.07</u>
Overhead	@ 36.9%	\$	64,277.92
Non Personnel Expense			
IT Programming		\$	25,000.00
Container repair parts			<u>29,400.00</u>
Sub total		\$	<u>54,400.00</u>
Total annual cost		\$	<u>425,760.89</u>
Divided by Containers handled annually			19,600
Handling cost per container		\$	<u>21.72</u>
Total Container Fee (add Sub total 1)		\$	<u>70.18</u> [\$70.00]

2. DELIVERY COSTS

Delivery Crew	0.4 hr per can	\$	7.63
Scheduling/appts etc.	0.1 hr per can		1.75
Labor load	@ 18%		<u>1.69</u>
Sub total		\$	<u>11.06</u>
Fringe rate	@ 64.7%	\$	7.15
Fringe load.	@ 18.0%		<u>1.29</u>
Sub total		\$	<u>8.44</u>
Overhead	@ 36.9%	\$	4.08
Non Personnel Costs		\$	<u>3.22</u>
Sub total		\$	<u>26.79</u> [\$25.00]

Prepared by: Environmental Services Department
Date: October 12, 2007

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Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: October 16, 2007
TO: Elmer L. Heap, Jr., Environmental Services Director
FROM: City Attorney
SUBJECT: Inapplicability of Proposition 218 to City's Proposed Automated Refuse Container Replacement Fee

INTRODUCTION

Since 1994, when the City began implementing automated refuse collection services City-wide, it has been the City's policy to furnish one approved automated refuse container to each City customer at the City's expense.¹ The City now proposes to modify the existing automated refuse container policy to return responsibility to the individual City customer to furnish replacement automated refuse containers at the customer's expense. Under the proposal, a City customer could acquire an approved replacement automated refuse container through a private vendor or, alternatively, from the City for a cost-recovery fee. The Environmental Services Department has requested an opinion on whether the proposed replacement automated refuse container fee, as presently structured, would be subject to Proposition 218.

QUESTION PRESENTED

Is the proposed automated refuse container replacement fee subject to Proposition 218?

SHORT ANSWER

No. As presently structured, the proposed automated refuse container replacement fee is probably not subject to Proposition 218 because it does not constitute a special tax, an assessment or a property-related fee.

¹ San Diego Resolution R-283379 (Feb. 7, 1994); San Diego Environmental Services Department Regulation 0001-00 (Jan. 7, 2000).

BACKGROUND

Pursuant to San Diego Municipal Code section 66.0126, it is the responsibility of the owner, operator, manager, or other person responsible for a residential or commercial facility to provide containers adequate to contain the refuse ordinarily accumulated at the facility pending collection. SDMC § 66.0126(a).² Prior to implementation of the automated container program, all customers of City-provided refuse collection services historically had provided their own refuse containers, at their expense. However, since 1994, when the City began implementing automated refuse collection City-wide, it has been the City's policy to furnish one automated refuse container to each customer at the City's expense. City customers who require two or more refuse containers at any one time pay a one-time user fee for each additional container.

To encourage recycling, the first recycling container is provided and delivered at no charge. Subsequent recycling containers also are provided at no charge for the container, but are subject to a delivery fee, unless the customer picks up the container. To encourage greenery recycling, the first automated greenery container also is provided free of charge; the second is subject only to a delivery fee, if applicable; and the third is subject to a below cost container fee, plus a delivery fee if applicable.

The City acquires automated containers for its customers' use pursuant to a contract with a private vendor. These automated containers remain the property of the City and, when warranty work is required, the City processes the warranty claim. The automated containers have a normal life expectancy of 10 or more years and come with a limited 10-year manufacturer's warranty. The first set of containers provided to City customers will need to be replaced sometime in the near future.

At this time, the City proposes to modify its existing automated refuse container policy to return responsibility to the individual customer to furnish replacement automated refuse containers.³ The City would continue to provide an initial automated refuse container at no charge, on a one-time basis, to a new housing unit. However, all customers would thereafter be responsible for furnishing replacement automated refuse containers at their expense when the initial automated refuse container provided to that housing unit became (i) unserviceable and out of warranty, (ii) lost, or (iii) stolen.

² SDMC § 66.0127, also known as the People's Ordinance, requires the City to provide refuse collection services to eligible residents at no charge, but does not require the City to furnish refuse containers to its customers. See City Attorney Report to Council June 13, 2005.

³ As currently proposed, the automated refuse container replacement policy and fee would not apply to recycling containers or greenery containers.

Customers would have the option of acquiring replacement automated refuse containers through retailers, such as Home Depot or Lowe's, or from other private vendors. The Environmental Services Department will prepare a list of container models and manufacturers who provide containers which meet City standards and publish that list to retailers, customers, and other sources.

Alternatively, the City will continue to maintain an inventory of containers, and customers could obtain a replacement automated refuse container from the City for a one-time, cost-recovery, user fee. Consistent with current policy, these containers would remain City property, and the City would process any warranty claims. At the customer's request, the City also would deliver a replacement container obtained from the City for a one-time, cost-recovery delivery fee. The fee for replacement of unserviceable refuse containers still under warranty would be pro-rated based on the number of years the container had been in use.

LEGAL ANALYSIS

Proposition 218, adopted by the voters in 1996, added articles XIII C and XIII D to the California Constitution. Article XIII C essentially prohibits local governments from imposing or increasing any tax, general or special, without voter approval. Cal. Const. art. XIII C, § 2. Article XIII D restricts the manner in which local governments may levy assessments upon real property [assessments] and fees or charges on real property or on a person as an incident of property ownership [property-related fees]. Cal. Const. art. XIII D, §§ 1-6. The primary purpose of Proposition 218 was to limit and control local government's ability to impose monetary levies on real property. *Richmond v. Shasta Community Ser. Dist.*, 32 Cal. 4th 409, 414-15 (2004); *Apartment Ass'n of Los Angeles County, Inc., v. City of Los Angeles*, 24 Cal. 4th 830, 837 (2001). Proposition 218 raises three issues applicable to the proposed automated refuse container replacement fee: (1) whether the fee would constitute a special tax; (2) whether the fee would constitute an assessment; or (3) whether the fee would constitute a property-related fee.

(1) Would the proposed automated refuse container replacement fee constitute a special tax?

Government Code Section 50076 specifically excludes from the definition of "special tax" any fee which (a) does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and (b) is not levied for general revenue purposes. Cal. Gov't Code § 50076; see *Mills v. County of Trinity*, 108 Cal. App. 3d 656, 662 (1980). So, assuming the proceeds of the proposed container fee are used for the specific purpose of providing the replacement automated refuse containers and associated services, and the fee does not exceed the reasonable cost of providing those goods and services, then the fee would not constitute a "special tax."

(2) Would the proposed automated refuse container replacement fee constitute an assessment?

An assessment is a charge imposed by local government upon real property for a special benefit conferred on the property. Cal. Const. art. XIII D, § 2(b), (i); Cal. Gov't Code § 53750(b). In determining whether a fee constitutes an assessment, one factor the courts consider is whether the fee will be imposed on identifiable parcels of real property. If the parcels upon which the fee will be imposed cannot be identified in advance, the fee is not an assessment under Proposition 218. *Richmond*, 32 Cal. 4th at 418-19. Another factor is whether the fee is secured by a lien on, or other recourse against, the real property. A fee that does not operate in that way is not an assessment. *Id.* at 420; *Pajaro Valley Water Management Agency v. Amrhein*, 150 Cal. App. 4th 1364, 1382 (2007).

The proposed automated refuse container replacement fee would not be a charge upon real property because it would not be imposed on identified parcels, but only on customers who choose to acquire a replacement automated refuse container from the City rather than from another source. Moreover, the fee would not be secured by real property or by other recourse to real property. If the fee is not paid, the City simply would not provide the container, and the customer would acquire one elsewhere. Thus, the proposed automated refuse container replacement fee would not constitute an assessment under Proposition 218.

(3) Would the proposed automated refuse container replacement fee constitute a property-related fee?

A fee under Proposition 218 is defined as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." Cal. Const. art. XIII D, § 2(e). A property-related service is defined as "a public service having a direct relationship to property ownership." Cal. Const. art. XIII D, § 2(h).

While case law regarding Proposition 218 continues to evolve, recent State Supreme Court opinions imply that refuse collection services, like water and sewer services, are "property-related services" under Proposition 218. *Richmond*, 32 Cal. 4th at 426-27; *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal 4th 205, 214-15 (2006). As such, some refuse collection service fees may be subject to the majority protest procedures in Proposition 218. *Richmond*, 32 Cal. 4th at 427; *Bighorn-Desert View Water Agency*, 39 Cal 4th at 215; Cal. Const. art. XIII D § 6(c). However, such fees would be subject to Proposition 218 if, and only if, the fee is imposed upon a person as an incident of property ownership. *Id.* If the fee is imposed as a result of a property owner's voluntary decision to apply for a government service, it is not imposed as an incident of property ownership. *Id.*

Other factors the State Supreme Court has considered important to this analysis are the two described in section (2) above, i.e., whether the agency can identify in advance those parcels which would be subject to the fee, and whether the fee would be enforced by way of a lien or other recourse against the real property. *Richmond*, 32 Cal. 4th at 426-28. A negative answer to these questions supports the conclusion that the fee is not subject to Proposition 218. *Id.*

The proposed automated refuse container replacement fee is not a fee for refuse collection services. The customer would not be required to pay the proposed fee in order to obtain or maintain City-provided refuse collection services. The customer could receive those services and avoid the fee altogether by supplying their own container which meets City specifications. Customers would have the option of acquiring replacement automated refuse containers from a retailer or other private source. However, the City would still provide customers the option of using a refuse container supplied by the City for a cost recovery fee if the customer chooses to do so. Thus, the proposed fee is not a fee for refuse collection services.

Nor is the fee otherwise a property-related fee because it is not imposed on real property or as an incident of property ownership. It is charged only as a result of an individual customer's voluntary decision to acquire a container from the City rather than from another source. The conclusion that the fee is not a property-related fee is reinforced by the fact that the City cannot determine in advance which customers, and therefore which parcels, would be subject to the fee. Moreover, failure to pay the fee simply means the customer will not receive a replacement automated refuse container from the City. The fee would not be secured by the real property. Thus, the proposed automated refuse container replacement fee probably would not constitute a property-related fee under Proposition 218.

CONCLUSION

As presently structured, the proposed automated refuse container replacement fee probably would not be subject to Proposition 218. As long as the fee does not exceed the reasonable cost of providing the automated refuse container replacement services for which the fee is imposed and the proceeds of the fee are used for the specific purpose of providing the replacement automated refuse containers and associated services, the fee would not constitute a special tax under Proposition 218. The proposed fee would not constitute an assessment because it would not be imposed on identifiable parcels, but rather in response to a customer's voluntary decision to acquire an automated refuse container from the City rather than from another source, and because the fee would not be secured by real property. Finally, the fee would not be a

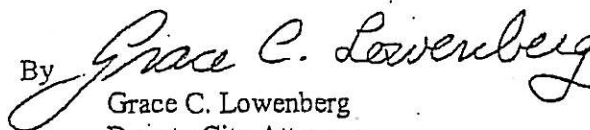
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property-related fee subject to Proposition 218 because customers could continue receiving City-provided refuse collection services without paying the fee; the fee would be charged only to a customer who voluntarily seeks to acquire a replacement refuse container from the City; the City cannot identify those customers/parcels in advance; and the fee would not be secured by any real property.

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